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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Twin Bay Medical, Inc.

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Serial No. 78077100

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Kathleen G. Mellon of Young & Basile, P.C. for Twin Bay Medical, Inc.

Florentina Blandu, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

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Before Hohein, Bucher and Rogers, Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Applicant seeks registration of a composite mark, shown below, for "barb clamps, made out of plastic, consisting of a sleeve and a collet, used to clamp flexible tubes on to [sic] barb fittings to provide a seal for gases or liquids" in International Class 17.[1]

[1] The application was filed August 2, 2001 on the basis of applicant's claim that it is using the mark in commerce. Applicant asserts March 1, 2001 as the date of first use of the mark anywhere, and April 1, 2001 as the date of first use of the mark in commerce.

BarbLock

Before discussing the issue on appeal, we note that the examining attorney and the applicant appear to disagree on their characterization of the mark. Applicant believes the mark consists of the single compound word BARBLOCK in a stylized form of lettering. The examining attorney appears to have concluded that the mark consists of the unitary expression BARB LOCK and an unspecified design element.[2] The USPTO database containing information on registrations and pending applications characterizes the drawing of the mark as illustrating "words, letters, and/or numbers in stylized form."[3]

[2] In her appeal brief, the examining attorney alternately refers to the "wording" or "literal portion" of applicant's mark as BARB LOCK (two words) or BARBLOCK (one word). The disclaimer requirement, discussed further infra, seeks a disclaimer of BARB LOCK (two words) and the examining attorney argues that those two words form a unitary expression. In general, it appears the examining attorney uses BARBLOCK (one word) when referring to the composite mark, e.g., "applicant … filed for registration on the Principal Register for the trademark 'BARBLOCK (and design element),'" but uses BARB LOCK (two words) when referring to the "literal portion" of the composite that must be disclaimed.

[3] The USPTO characterizes the mark in each application by assigning it a particular "mark drawing code." Code number 5,

This appeal involves the examining attorney's refusal to approve applicant's mark for publication unless applicant includes a disclaimer of the literal element in its mark. Applicant is reluctant to provide the disclaimer because it does not view the composite mark as including a design element and believes that if it disclaims the literal element, then it will have disclaimed its "entire mark" contrary to established practice. Reply brief, p. 4.[4] Apart from its stated concern that it might be found to have "violated" the TMEP, applicant also asserts that "[b]ecause the applicant created this term and believes it is not descriptive of its goods, it does not believe it should enable others to be free to use 'BARBLOCK' on the exact goods as long as it is not in the same stylized format as the Applicant is using."[5] *Id.*

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assigned to the involved application, is for "words, letters, and/or numbers in stylized form." A code is assigned for administrative convenience and has no bearing on the examining attorney's review of the application, or on ours.

[4] "The Applicant was concerned about entering a disclaimer of 'BARBLOCK' in that TMEP § 1213.06 indicates that an entire mark cannot be disclaimed. The Applicant's attorney did not file the initial application but believes the mark does not really have an additional design element. Rather, the mark is *BARBLOCK* in a stylized form." Reply brief, p. 4.

[5] Applicant is correct in concluding that, if it submits the disclaimer, it would be acknowledging the right of others to use the disclaimed matter when necessary to describe their products. Terms that are descriptive of goods or services should be freely available for purveyors of such goods or services to use. The purpose behind a disclaimer is to make clear that a party

As to applicant's first concern, we need not opine on the question whether the interlocking "b" and "L" in applicant's mark are a design element or merely a feature of the stylized lettering employed. Applicant's concern about it being held to have "violated" the TMEP if it were to disclaim BARBLOCK (or BARB LOCK) is misplaced. It is, of course, correct that an entire mark may not be disclaimed. However, an applicant may disclaim the entire literal portion of a mark when the circumstances are such that the stylization of the lettering is itself distinctive and can support registration of the composite with the literal element disclaimed. In re Miller Brewing Co., 226 USPQ 666, 667 n.3 (TTAB 1985). In other words, it is not critical that applicant's mark unequivocally be found to have a separate "design element" for the composite mark to be registered with the required disclaimer. The examining attorney clearly has stated that the composite mark may be registered with a disclaimer. We need not be concerned with whether she reached that conclusion because she views the mark as including some unspecified design element or

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registering a composite mark that includes a descriptive or generic term is not thereby abridging the right of others who may need to use the term. In re Pencils Inc., 9 USPQ2d 1410, 1411 (TTAB 1988) ("the basic purpose of a disclaimer is to make of record, if it might otherwise be misunderstood, that a significant element of a composite mark is not being exclusively appropriated, apart from the composite").

merely as employing distinctive stylization. The bottom line is the examining attorney would approve the mark for publication with the disclaimer, and the only question before us is whether the disclaimer requirement is appropriate because the literal element of the composite mark is merely descriptive.

As to the difference of opinion regarding whether the literal element of the mark is the single compound word BARBLOCK, as applicant contends, or the two-word unitary expression BARB LOCK, as the examining attorney contends, we note that the examining attorney is invested with a certain degree of discretion in her assessment of the impression created by a mark. See TMEP Sections 807.08, 1213.01(a) and 1213.05(a). We see no error in the examining attorney's determination that, notwithstanding the display of the mark as a stylized compound word (or a stylized compound word with a design element), the appropriate disclaimer would be as to BARB LOCK rather than BARBLOCK, in view of the use of upper and lower case letters that make it clear that the compound is formed of the root components BARB and LOCK.

The examining attorney, in her office actions, alternately argued that BARB LOCK is generic or merely descriptive. In her brief, however, the issue on appeal is

presented solely as whether the term is merely descriptive when used on or in conjunction with applicant's goods.[6]

In assessing the evidence and the likely perception of the term as used by applicant, we adopt the point of view of the average or ordinary consumer in the class of prospective purchasers for applicant's product. *See* In re Omaha National Corp., 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987). Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods for which registration of the term is sought, the context in which it is being used on or in connection with those goods, and the possible significance that the term would have to the average purchaser because of the manner of its use. *See* In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

Whether consumers could guess what the product is from abstract consideration of the literal element of the composite mark is not the test. In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985). However, the evidence will have to establish that BARB LOCK immediately describes an ingredient, quality, characteristic or feature of applicant's product or conveys information regarding the

[6] To be absolutely clear, we note that, on the record in this application, we would find that BARB LOCK is not generic.

nature, function, purpose or use of the product. *See* In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978); *see also*, In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

Accordingly, we now consider whether BARB and LOCK are descriptive terms when used in connection with applicant's goods and, if so, whether the terms retain their descriptiveness when used together as a unitary expression.

Applicant chose to identify its goods as "barb clamps" used to clamp flexible tubes onto "barb fittings," and we must presume that applicant chose these terms to describe its goods because they will be immediately understood by average purchasers of the goods. In fact, applicant's "master distributor" uses "barb" in a descriptive manner in promotional literature for applicant's products, and also notes therein that applicant's goods can be produced in custom sizes "to fit your existing barbed fitting."[7] Thus, when average purchasers of applicant's goods encounter the mark and goods, the word BARB clearly will have descriptive significance.

As for the term LOCK, the examining attorney, in her appeal brief, has asked that we take judicial notice of a

[7] Applicant, at page 3 of its initial brief, in response to the examining attorney's reliance on a TC Tech web page (www.tc-

dictionary definition of "lock" as meaning "to fasten the lock of" and argues that the term clamp is synonymous with the terms "fasten" or "lock." She concludes that "applicant's goods are intended for use on barbs and they are used to lock the barbs." Brief, p. 4. While we disagree with the examining attorney's conclusion we do find the term LOCK descriptive when used on or in conjunction with the goods.

We take judicial notice of the following definition of "lock": "3a: a locking or fastening together: a closing of one thing upon another" *Webster's Third New International Dictionary* 1328 (1993). From the record, we also note the following passage in a web site listing of exhibitors at a trade show:

> **Barblock Corporation**
>
> *Booth 5597*
>
> BarbLock™ The Ultra-Secure Tubing Retainer--BarbLock is the system that locks and seals flexible tubing onto barbed fittings. By providing a 360º radial crimp & seal at the tube-fitting interface, BarbLock eliminates leak path and pull-off problems inherent in other systems. …

The quoted excerpt is from the web page for the exposition "Medical Design & Manufacturing West 2003"

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tech.com) as evidence of descriptiveness of BARB LOCK, asserts, "TC Tech is a master distributor of the Applicant's goods."

(www.devicelink.com/expo/west03). Applicant, in its reply brief, asserts that it is the Barblock Corporation, although there is nothing in the USPTO assignment records that indicates the involved application has been assigned or that applicant has changed its name, and applicant has not explained why it, Twin Bay Medical, Inc., and Barblock Corporation should be considered one and the same entity. We accept, for the sake of argument, applicant's contention that it is one and the same as Barblock Corporation. While this may bolster applicant's claim that only it and its distributors utilize the composite term "Barblock" or "BarbLock," it does not counter the descriptive use of the term "lock" in the description of applicant's product.

In view of the dictionary definition that describes "lock" as meaning, inter alia, a fastening together or closing of one thing upon another, and in view of the asserted description by applicant of its own goods, which describe the goods as locking and sealing one thing upon another (i.e., flexible tubing onto barbed fittings), we find that LOCK is a descriptive term when used on or in conjunction with the goods. Prospective purchasers of applicant's product would not have to engage in any thought, imagination or involved reasoning to understand the significance of LOCK; rather, such individuals would

readily understand that applicant's product locks the flexible tubing onto the barbed fitting.[8]

While we have determined that both BARB and LOCK are descriptive terms when used on or in conjunction with applicant's goods, we must now consider whether, as the examining attorney contends, BARB LOCK is a unitary expression that is just as descriptive as the individual words BARB and LOCK. Applicant is entirely correct in arguing that two individually descriptive terms can, when joined, form a registrable mark. The examining attorney, however, is correct in contending that registrability of combined, descriptive terms generally stems from some incongruity, ambiguity, double entendre or other distinctive result accomplished by the combination.

Applicant has contended that it has coined its mark, but has not explained any theory why the combination of BARB and LOCK results in an inherently distinctive mark, rather than a merely descriptive unitary expression. We can discern no resulting ambiguity, double entendre, or any sort of play on words that creates a distinctive source identifier merely by the coupling of the two descriptive

[8] We also note that the applicant, in its first of two requests for reconsideration, conceded that it "is now willing to disclaim the term 'LOCK' apart from the mark as shown." Applicant never expressly withdrew the statement.

terms.[9] When prospective purchasers of applicant's product consider BARB LOCK in conjunction with the identified goods, i.e., barb clamps that clamp flexible tubing onto barb fittings, they will immediately understand that the barb clamp and tubing are locked onto the barb fitting.

Applicant's most-pressed arguments in support of registration without the disclaimer are that BARBLOCK (or BARB LOCK) cannot be found in dictionaries; that the evidence entered into the record does not show use of the term for goods such as applicant's, with the exception of web pages that are asserted to show only use by applicant or its distributors; that others do not have a competitive need to use the term; and that a term is not precluded from registration merely because it conveys information about the goods.

We agree with applicant that much of the evidence put into the record by the examining attorney is irrelevant or not probative of the significance of the term in relation

[9] Moreover, we note that it does not matter whether we consider the question to involve the unitary expression BARB LOCK or, as applicant would prefer, the compound word BARBLOCK. As discussed supra, applicant seeks registration of a particular, stylized version of its mark, the literal element of which will be perceived as BARB LOCK, even if there is no space between the words, because of the use of upper and lower case lettering. Thus, prospective purchasers will not have to guess or puzzle about what the term is a combination of; it will readily be perceived as a combination of BARB and LOCK.

to applicant's goods. However, we otherwise do not find applicant's arguments persuasive. It is well settled that the absence of a term from a dictionary does not preclude it from being held merely descriptive. *See* In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1111-12 (Fed. Cir. 1987) (SCREENWIPE held generic though dictionary listings available only for components SCREEN and WIPE, because combination held not distinctive); see *also* In re Recorded Books Inc., 42 USPQ2d 1275, 1280 (TTAB 1997) (absence of dictionary listing for term RECORDED BOOK not dispositive because combination had a plain and readily understood meaning). It is equally well settled that the first or only user of a term is not necessarily entitled to register the term as a trademark. *See* In re Interco Inc., 29 USPQ2d 2037, 2039 (TTAB 1993). Finally, while a term may be registrable even if it conveys information, it is not registrable when that is all it does, absent a showing of acquired distinctiveness.

Decision*:* The requirement under Section 6 of the Trademark Act, 15 U.S.C. § 1056, for a disclaimer of "BARB LOCK" apart from the mark as a whole, is affirmed. However, the refusal of registration in the absence of a disclaimer will be set aside and the mark will be published for opposition if applicant, no later than 30 days from the

mailing date hereof, submits an appropriate disclaimer. *See* Trademark Rule 2.142(g).